

ESTTA Tracking number: **ESTTA89350**Filing date: **07/11/2006**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Bryan Corporation		
Entity	Corporation	Citizenship	Massachusetts
Address	4 Plympton Street Woburn, MA 01801 UNITED STATES		
Correspondence information	Daniel G. Jarcho/Andrew J. Park Attorney McKenna, Long & Aldridge, LLP 1900 K Street, N.W. Washington, D.C., DC 20006 UNITED STATES apark@mckennalong.com Phone:202-496-7442		

Registration Subject to Cancellation

Registration No	3093389	Registration date	05/16/2006
International Registration No.	NONE	International Registration Date	NONE
Registrant	NOVATECH SA Voie Antiope, ZI ATHELIA III F-13600 LA CIOTAT FRANCE		
Goods/Services Subject to Cancellation	Class 005 Goods/Services: Pharmaceutical products containing talcum powder, namely, pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions, pneumothorax, mesothelioma, skin disorders, cancer, and gout; sanitary products containing talcum powder, namely, sanitary pads, sanitary napkins, and sanitary preparations for medical use all containing talcum powder; talcum powder for medical use, namely, medicated talcum powder		

Attachments	BRYAN.PETITION FOR CANCELLATION.PDF (8 pages)(194803 bytes)
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Signature	/ajp/
Name	Andrew J. Park
Date	07/11/2006

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

BRYAN CORPORATION,)	
)	
Petitioner,)	
)	Cancellation No.
v.)	
)	
NOVATECH SA,)	
)	
Registrant.)	
_____)	

PETITION FOR CANCELLATION

Bryan Corporation ("Petitioner"), a corporation organized under the laws of Massachusetts, with an office and principal place of business at 4 Plympton Street, Woburn, MA, hereby petitions to cancel Registration No. 3,093,389 pursuant to 15 U.S.C. § 1064 et seq. and 37 C.F.R. § 2.111 et seq.

Petitioner alleges the following as grounds for cancellation:

1. Petitioner is engaged in the development, manufacture, and sale of medical devices and drug products. This matter involves Petitioner's drug product STERILE TALC POWDER, which is a sclerosing agent for the prevention of recurrent malignant pleural effusion ("MPE"), using talc powder as the active ingredient (hereinafter "the Product"). The United States Food and Drug Administration ("FDA") has determined that under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq., this type of product used to treat MPE cannot be distributed in interstate commerce without prior approval by FDA.

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2. Petitioner secured FDA approval for STERILE TALC POWDER on December 15, 2003. By its terms, such approval authorized both the use of the name STERILE TALC POWDER for the Product and the distribution of that Product in interstate commerce.

3. On information and belief, Petitioner is the only company to have obtained FDA approval for a drug product that is a sclerosing agent for the prevention of recurrent MPE, using talc powder as the active ingredient. On information and belief, Petitioner also is the only company to have obtained FDA approval for the use of the name STERILE TALC POWDER for a drug product. The name of a drug product is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use.

4. The name of a drug product is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use. The FDA vigorously and strictly regulates the use of drug product names. In assessing the permissibility of a prospective drug name, the FDA will, among other things, (1) check for similarity to any prior FDA-approved drug name; and (2) consider the prospective drug name with the nature of the drug to ensure that it is not misleading as to the nature of the drug, its efficacy, or its ingredients.

5. Petitioner initially sought FDA approval for the name TALC POWDER but upon consideration, the FDA demanded Petitioner use the name STERILE TALC POWDER instead since the active ingredient - talc powder - is sterilized. Accordingly, since the FDA not only approved, but insisted on the use of the name STERILE TALC POWDER for Petitioner's FDA-approved Product, the name is (1) dissimilar to the name of any other third-party's FDA-approved drug product, particularly a drug product that is a sclerosing agent for the prevention of

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MPE using talc powder; and (2) it is not misleading in any manner vis-à-vis the nature of the drug.

6. It is unlikely for any third-party to obtain FDA approval for the name of a drug that is identical or similar to the name STERILE TALC POWDER for drugs that are identical or similar to Petitioner's Product. Thus, it is unlikely for Registrant to obtain FDA approval for the name STERITALC for the drug products claimed by its trademark registration since it is similar to Petitioner's FDA-approved STERILE TALC POWDER mark and it is used on drug products that are similar to Petitioner's Products.

7. Petitioner has obtained common law intellectual property rights to the STERILE TALC POWDER mark through its exclusive, continuous, and extensive use in commerce throughout the United States in connection with the Product, and as a result, the mark is famous and well-known as the source identifier of Petitioner's FDA-approved Product.

8. On March 21, 1996, Registrant, a French company, filed U.S. application Serial No. 75/076,198 for registration on the Principal Register for the mark STERITALC for "Pharmaceutical products containing powder" (later amended to "Pharmaceutical products for the treatment of pulmonary ailments, namely aerosols and flasks containing talc as an active ingredient") in International Class 005. This application was based on intent-to-use and eventually matured into U.S. Reg. No. 2,116,833 on November 25, 1997.

9. On August 28, 2004, Registrant's U.S. trademark Reg. No. 2,116,833 was canceled for failure to file an affidavit of continued use.

10. On December 28, 2004, Registrant once again sought U.S. registration for the STERITALC mark by filing a new application with the PTO. The new U.S. application Serial

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No. is 79/008,374. This application was based on Registrant's International Registration for the STERITALC mark ("Section 66(a) application"). The Section 66(a) application claimed "Pharmaceutical products containing talcum powder, namely pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions, pneumothorax, mesothelioma, skin disorders, cancer, gout; sanitary products containing talcum powder, namely sanitary pads, sanitary napkins, sanitary preparations for medical use all containing talcum powder; talcum powder for medical use, namely medicated talcum powder" ("Re-filed mark"). The Section 66(a) application for the Re-filed mark eventually matured to registration on May 16, 2006.

11. In support of the registration of the Re-filed mark, Registrant executed and submitted a declaration that stated, among other things that (a) it believes it is entitled to use the STERITALC mark in commerce; and (b) it believes, to the best of its knowledge and belief, that no other third party has the right to use the same or similar mark on the same or similar goods in commerce.

12. On information and belief, if FDA were notified of Registrant's intent to distribute its pharmaceutical products in interstate commerce, and of Registrant's intent to do so using the STERITALC name for the products, FDA would determine that such distribution of products and use of the name require FDA approval. On information and belief, Registrant has not obtained FDA approval to distribute its pharmaceutical products in interstate commerce. On information and belief, Registrant has not obtained FDA approval to use the name STERITALC for its pharmaceutical products.

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13. Registrant procured registration of the Re-filed mark by false means and/or by knowingly and willfully making false and/or fraudulent declarations or representations to the PTO, including, *inter alia*, falsely alleging in a Declaration that Registrant believed it was entitled to use the mark in commerce, when Registrant did not then and still has not obtained approval from FDA to distribute its product in commerce or to use the name STERITALC. On information and belief, said false statements were made with the intent to induce the PTO to grant said registration, and reasonably relying upon the truth of said false statements, the PTO did, in fact, grant said registration to Registrant on May 16, 2006.

14. Since at least December 15, 2003, Petitioner has been manufacturing, marketing and selling its FDA-approved Product continuously and extensively in interstate commerce under the trademark STERILE TALC POWDER.

15. Petitioner has spent substantial amounts of time, money and effort to develop, test, and market its FDA-approved Product. On information and belief, there is no other FDA approved product sold in the United States that is a sclerosing agent for the prevention of recurrent MPE using talc powder as the active ingredient, with the exception of another related but different FDA-approved product also developed, marketed and sold by Petitioner called "Sclerosol." Further, on information and belief, there is no other FDA approved product sold in the United States under the name STERILE TALC POWDER or a similar name. As a result, Petitioner's Product and its mark STERILE TALC POWDER have become famous and well-known and, specifically, the mark STERILE TALC POWDER has become famous and well-known as the source identifier of Petitioner's FDA-approved Product.

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16. On information and belief, Registrant has not obtained FDA approval authorizing the sale of any of its products under the STERITALC mark in the United States. Therefore, Petitioner has priority of use and common law rights to the STERILE TALC POWDER mark that are senior to Registrant's registration of the STERITALC mark.

17. Registrant's STERITALC mark is nearly identical to Petitioner's STERILE TALC POWDER mark in terms of appearance, pronunciation and meaning.

18. Registrant's STERITALC registration claims goods that are the same or similar to Petitioner's FDA-approved Product, the channels of trade are the same or similar, and they are targeted to the same potential purchasers in the medical community and the general public.

19. Petitioner's Product is the only FDA-approved drug, and its name, STERILE TALC POWDER, together with the related Petitioner product called Sclerosol, are the only FDA-approved product names for a sclerosing agent for the prevention of MPE using talc powder as the active ingredient.

20. The similarity in appearance, pronunciation and meaning of Registrant's STERITALC mark to Petitioner's FDA-approved STERILE TALC POWDER mark, and the similarity of the respective products, channels of trade, and intended consumers make it likely that, when Registrant's mark is applied to Registrant's products, it will cause confusion and mistake, in particular, it will cause consumers to wrongly believe that Registrant's product is an FDA-approved drug when it is not and it will deceive as to the source, origin, or sponsorship of Registrant's goods, with consequent injury to Petitioner and to the patient population taking these pharmaceutical products.

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21. Petitioner is likely to be damaged by the registration of Registrant's STERITALC mark because such registration will support and assist Registrant in the confusion and misleading use of Registrant's mark and will give color of rights in Registrant in violation of the superior rights of Petitioner.

22. In view of the above allegations, Registrant is not entitled to continue registration of its mark since Registrant, upon information and belief, obtained the registration through misrepresentation and fraud and the subject registration is likely to cause confusion and mistake and to deceive as to the source, origin, or sponsorship of Registrant's products.

WHEREFORE, the Petitioner respectfully prays that Registration No. 3,093,389 be canceled.

Respectfully submitted,

Dated: July 11, 2006



Daniel G. Marchio
Andrew J. Park
Attorneys for Petitioner

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

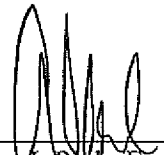
BRYAN CORPORATION,)	
)	
Petitioner,)	
)	Cancellation No.
v.)	
)	
NOVATECH SA,)	
)	
_____ Registrant.)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR CANCELLATION** was served on Registrant by mailing a true copy thereof to the attorney of record via overnight carrier addressed as follows:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street, 7th Floor
Houston, Texas 77002

this 11th day of July, 2006.



Andrew J. Park, Esq.
Attorney for Bryan Corporation, Petitioner

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